

Washington Law Review

Volume 23
Number 4 *Annual Meeting*

11-1-1948

Report of Committee on the Retirement of Judges

Alfred J. Schweppe

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>

Digital Commons
Part of the [Judges Commons](#)
Commons

Network
Recommended Citation
Logo

Alfred J. Schweppe, State Bar Journal, *Report of Committee on the Retirement of Judges*, 23 Wash. L. Rev. & St. B.J. 328 (1948).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol23/iss4/9>

This State Bar Journal is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

This matter was presented to the members of this Committee and the literature forwarded to each. The matter was considered by every member of the Committee, and each member wrote his own opinion in a letter to the Chairman. The result of this canvass by mail was the unanimous opinion of the members of this Committee that the admission of attorneys to the federal bar should best be left to the discretion of the presiding judges in the respective districts.

The result of this action has been previously reported to the Board of Governors.

Your Chairman has discussed with the President of the Washington State Bar Association about whether it would be desirable for this Committee to initiate any projects or investigations of its own. Mr. Munter felt that the duty of the Committee would be fully performed if we were content to pass only on matters referred.

Report of Committee on the Retirement of Judges,
by Alfred J. Schweppe

In December of 1946 the Committee on the Selection of Judges circulated the bar with a postcard ballot, covering mandatory retirement of judges at the age of seventy-five. The ballot resulted as follows:

Total vote cast.....	942
In favor	753
Opposed	144
No opinion	45

The Committee on the Selection of Judges, which circulated that ballot, suggested a proposed constitutional provision carry compulsory retirement into effect in connection with an appropriate retirement plan to be established by the Legislature. That Committee accepted the view previously expressed by the State Judicial Council (to which the subject had earlier been referred for consideration) that the result could not be attained by legislation, but could only be carried into effect by constitutional amendment.

Our information is that it was the view of the Judicial Council that since Article IV of the state Constitution, relating to the judiciary, sets certain limitations on eligibility to the office of judge of the Supreme or the Superior Court, *viz.*, that a judge must have been admitted to practice law in the courts of record in this state (Article IV, Section 17), that he cannot hold any other office or public employment (Article IV, Section 15), and that he shall not practice law in any court (Article

IV, Section 19), that other limitations on eligibility, including a limitation on account of age limit, were forbidden by necessary implication, and that, therefore, the Legislature would not have power by legislation to fix a compulsory retirement age, although the Legislature could, without doubt, deny pension benefits (judicial pensions being of legislative creation) to any judge who did not retire at some age established by statute.

We are informed that the Judicial Council recognized that the state Legislature may legislate on any subject not forbidden by the state Constitution (see *State ex rel. Robinson v. Fluent*, 130 Wash. Dec. 179, *State ex rel. Hamblen v. Yelle*, 129 Wash. Dec. 64, and see *Paine and Port of Seattle*, 70 Wash. 294, 301, *State ex rel. Pishue v. Olson*, 173 Wash. 60, 66, that the constitutional prohibition may be inferential as well as express), but believed that the expression of certain eligibility requirements for the office of judge in the state Constitution negated any others and placed them beyond the power of the Legislature; and that to concede such power would authorize the Legislature to fix any age limits or other additional eligibility requirements.

Without accepting as a finality the constitutional views just outlined, the Committee believes that further study should be made of whether or not compulsory retirement, as distinguished from optional retirement, can be accomplished by legislation, rather than by constitutional amendment. Some authorities on this subject are collected in 48 C. J. S., page 971. It seems, in any event, clear that if it is intended to affect the tenure of a judge now in office, it can only be done by constitutional amendment, 48 C. J. S., page 969.

To the limited extent that the undersigned Committee has considered the subject matter of its appointment in correspondence or in discussion with other judges and lawyers, it appears that there is a rather strong consensus that compulsory retirement is desirable. The opinion varies, however, somewhat as to the details, about as follows:

1. Some favor mandatory retirement on the judge's seventy-fifth birthday. That was the idea submitted a couple of years ago by the Committee on the Selection of Judges, in the enclosure attached to this report.

2. Some of the judges seem to favor a provision rendering a person ineligible to file and be elected, or to be appointed, after attaining the age of seventy-five. Thus if a Supreme Court judge were elected at the age of seventy-four, he could serve until the age of eighty.

3. There is a fairly strong consensus among lawyers, to the extent

that they have been interviewed, in favor of a provision rendering persons ineligible to file and be elected, or to be appointed, after attaining the age of seventy. In other words, under this view, a judge of the Supreme Court, elected at the age of sixty-seven, would complete his term, but he would be ineligible to run again upon completion of his term at the age of seventy-three. Similarly a Superior Court judge, elected at the age of sixty-eight, could not run again after the completion of his four-year term at the age of seventy-two.

4. The New York Constitution provides that "no person shall hold the office of judge or justice of any court or surrogate longer than until and including the last day of December next after he shall be seventy years of age." See *Johnson v. Flynn*, 289, N. Y. Supp. 693.

It may be stated, parenthetically, that the Federal Judicial Retirement Act (see latest form, 28 U. S. Code 3371, as amended by the Act of June 25, 1948) is purely optional at the age of seventy and not compulsory, since federal judges under the federal Constitution hold their offices "during good behavior," and cannot by legislation be made to retire compulsorily. Ex parte *Bakelite Corporation*, 279 U. S. 438, 449, and see *In re Opinion of the Justices*, (Mass.) 179 N. E. 237.

Your Committee, not having had a meeting on the subject and only very inadequate correspondence, has not formulated any views on the subject matter of its appointment, and desires this report to be received merely as a progress report.

The whole subject deserves a searching examination, including consideration of the closely related problems of adequate judicial retirement pay (see Chapter 229, Laws of 1937, as amended by Chapter 19, Laws of 1945), because, without adequate retirement pay, compulsory retirement may be considered open to question.

If and when conclusions have been formed on these matters by the present committee, or its successor, it is suggested that it may be desirable, in view of the importance of the subject, to submit any affirmative plan of retirement, or alternative plans of retirement, to a general referendum of the bench and bar, before the matter is taken up with the Legislature, either by way of proposing a constitutional amendment, or by way of ordinary legislation.

A. J. O'Conner

L. L. Thompson

A. A. Hull

Alfred J. Schweppe, *Chairman*

Dissenting Opinion

I do not agree with the above entitled report, as in my opinion proposed legislation should be prepared and submitted to the next Legislature rendering any judge who has reached the age of seventy during his term of office ineligible to re-election. I believe this would be wholly constitutional.

Nat U Brown

Notes on the American Bar Association Meeting in Seattle,
by William J. Madden

That the American Bar Association meeting in Seattle in September of this year was an outstanding success is generally agreed. A sampling of the opinion of any of the visitors usually elicited a response indicating that those who came from afar were well and favorably impressed with the manner in which the arrangements were handled, and with the hospitality which they encountered. Unlimited credit should go to the General Chairman, to our Executive Secretary, and the hosts of assistants who made the meeting one of which we can be proud.

Inasmuch as the events of the bar meeting will be reported fully in other publications devoted to that function, it is not proposed to set them forth at length herein. Due, however, to the fact that one of our practicing brethren and a former president of our state bar has been accorded the high honor of having been asked to lead the American Bar Association for the ensuing year, we have requested him to make a few remarks for publication in this issue. He responded with a characteristically stimulating discourse on the importance of the bar and its members at this crucial time in our history. We further were of the opinion that the issue would be incomplete were it not graced by the address of welcome which was given to the meeting by Richard S. Munter, our President.

Remarks Accepting the Presidency, by Frank E. Holman

No one receives and undertakes the Presidency of the American Bar Association without sensing the great honor and at the same time the great opportunity and obligation of that high office. The success of your President is largely dependent upon the help and cooperation of the whole membership. With this help and cooperation, we shall strive to continue during the coming year to make the organized Bar not only an active voice, but an active force, for the public good.